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No. 92-612

In the Supreme Court of the United States.

October Term, 1992

LAWRENCE MACKIN, et al.,
Petitioners,

v.

CITY OF BOSTON, et al.,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for
the First Circuit

BRIEF IN OPPOSITION OF MASSACHUSETTS PERSONNEL ADMINISTRATOR

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The petitioners have set forth the following question presented:

QUESTION PRESENTED

Did the Court of Appeals for the First Circuit improperly apply the holdings of the United States Supreme Court in Wygant v. Jackson Board of Education, 476 U.S. 267 (1986); City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) and United States v. Paradise, 480 U.S. 149 (1987) when finding that the hiring practices under a 1974 consent decree by the City of Boston were constitutionally permissible when providing race-based relief over higher-scoring white persons?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are listed in the Petition for Certiorari. This brief in opposition is submitted by the state respondent, the Massachusetts Personnel Administrator.

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Supreme Court Rule 15 1

Pursuant to Supreme Court Rule 15, the respondent Massachusetts Personnel Administrator submits this brief in opposition to the Petition for Writ of Certiorari filed in this case.

DECISION BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 969 F.2d 1273 (1st Cir. 1992). See Appendix A to Petition for Writ of Certiorari, pp. 1a-15a.[1/] The decision of the United States District Court for the District of Massachusetts was not reported. App. 16a-30a.

1/ References to the Appendix to the Petition for Writ of Certiorari will hereafter be designated "App. [page #]".

RELEVANT CONSTITUTIONAL PROVISION

The Equal Protection Clause of the Fourteenth Amendment to the Constitution states that "[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioners are white applicants for entry level positions in the respondent Boston Fire Department (the "Department" or "BFD"). They contend that the Department has contravened their rights under the Equal Protection Clause of the Fourteenth Amendment by hiring firefighters in accordance with a remedial order entered in Boston Chapter, NAACP, Inc. v. Beecher, 371 F.

Supp. 507 (D. Mass. 1974), aff'd, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975) (hereafter the "Beecher decree" or the "decree"). App. 31a-40a. Petitioners also contend that the respondent Massachusetts Personnel Administrator (the "Personnel Administrator") has violated their rights under the Equal Protection Clause by certifying to the BFD, in the exercise of his authority under Massachusetts civil service law, a list of firefighter applicants in accordance with the Beecher decree.

Proceedings in the Beecher case

In 1972, representatives of a class of unsuccessful black and Hispanic applicants for firefighters positions

throughout the Commonwealth of Massachusetts commenced an action against the City of Boston, its Fire Commissioner and the members of the Massachusetts Civil Service Commission. Boston Chapter, NAACP, Inc., et al. v. Nancy B. Beecher, et al., 371 F. Supp. 507 (D. Mass. 1974). The plaintiffs claimed racial discrimination in violation of 42 U.S.C. §§ 1981 and 1983 in connection with recruitment and certification practices established by the Massachusetts Civil Service Commission and implemented by the BFD and other municipal fire departments across Massachusetts. 371 F. Supp. at 509-510. In 1973, the Attorney General of the United States brought an action raising similar claims, together with

claims under Title VII, 42 U.S.C. § 2000e et seq. United States v. City of Boston, et al., C.A. No. 73-269-F. The two actions were consolidated. Id. at 510.[2/]

Following evidentiary hearings, the District Court found that blacks represented approximately 16% of Boston's population, that the combined minority population of Boston was 23% of the total and that blacks and Hispanics represented only 0.9% of the

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2/ The opinions of the District Court and the Court of Appeals describe in detail the proceedings in the consolidated action. See Boston Chapter, NAACP, Inc. v. Beecher, 371 F. Supp. 507 (D. Mass. 1974), aff'd, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975).

Department's sworn personnel. Id. at 514. The Court found, as evidenced by the "insignificant" number of blacks and Hispanics certified, that the civil service examinations administered from 1968 through August 1971 to applicants for entry level firefighter positions were discriminatory. It also found that the BFD's word-of-mouth recruitment policy resulted in unintentional racial discrimination. Id. at 510, 515, 519-20.

In February 1974, the District Court ordered a program of active recruitment of minority firefighters, enjoined further certification based upon the results of the discriminatory examinations, ordered development of a job-related examination, and required preferential certification of black and

Hispanic applicants. Id. at 520-23.[3/] It also ordered that these remedial measures remain in force for any city or town with a minority population greater than 1% until its fire department "achieves a complement of minorities commensurate with the percentage of minorities within the community". Id. at 523. The Court of Appeals for the First Circuit affirmed. Boston Chapter,

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3/ The preferential certification procedure first required the establishment of an eligible list of candidates who had passed the firefighters examination and met the other eligibility requirements for the position. The decree then stipulated that the list consist of one minority candidate (i.e. black or Spanish-surnamed) for each white candidate, until the group of qualified minority applicants was exhausted. See App. 5a (note 2), 33a-35a.

NAACP, Inc. v. Beecher, et al., 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975).

In the years since the entry of the Beecher decree, substantially increased numbers of black and Hispanic persons have been appointed to firefighter positions in municipalities across Massachusetts. As a result, thirty-four fire departments that originally were subject to the decree have been exempted from its preferential certification requirements by reason of their appointment of minorities in numbers commensurate with the minority population in the respective communities, as based on the most recent federal census. Record Appendix,

pp. 96, 197.[4/] There are currently twenty-four municipal fire departments, including the BFD, that remain subject to the decree. R.A. 96.

The Mackin case

The present case was filed in September 1989. Petitioners are white male applicants for firefighter positions in the City of Boston who took the firefighters examination on December 7, 1987 and received a score of 100%. R.A. 57. Each alleges that he was otherwise qualified for the position of firefighter, but was "passed over for

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[4/] References to the Record Appendix which was filed with the petitioners' brief in the Court of Appeals will hereafter be designated "R.A. [page #]".

appointment" because the Personnel Administrator, following the Beecher decree, certified a list of eligible candidates that placed certain black and Spanish-surnamed applicants ahead of the petitioners on the list, although their scores were lower than petitioners' scores. R.A. 57. In their Amended Complaint, petitioners alleged that the Personnel Administrator's adherence to the Beecher decree violates the Equal Protection Clause and Title VII of the Civil Rights Act of 1964. R.A. 58-60, 63-64. Petitioners also alleged that the goals of the Beecher decree have been met and, therefore, that the defendants may no longer implement its

minority preference requirements. R.A. 61-62.[5/]

Motions for summary judgment were filed by all parties. The District Court granted summary judgment for the respondents, finding that the Beecher decree does not violate the Equal Protection Clause or Title VII and that the BFD has not yet satified the terms of the decree. App. 20a-30a. The Court of Appeals for the First Circuit

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5/ After the present case was filed, ten of the thirty-five petitioners were appointed to entry-level positions in the BFD in April 1990. R.A. 195. Two other petitioners were offered appointments in April 1990; one of them rejected the opportunity and the other failed the medical examination. R.A. 196.

affirmed. 969 F.2d 1273 (1st Cir. 1992). App. 1a-15a.

REASONS FOR DENYING THE WRIT

This petition does not present a question of "such gravity and general importance" as to warrant review by this Court. In re Woods, 143 U.S. 202, 206 (1892). Petitioners do not contend that the decision below conflicts with that of any other court of appeals, or that the lower court announced a rule of law at variance with decisions of this Court. No important issue of federal law is raised in the petition which would warrant plenary review by this Court.

I. THE PETITION RAISES ONLY QUESTIONS OF FACT AND OF THE INTERPRETATION OF A PRIOR JUDICIAL DECREE UNIQUE TO THIS CASE.

The petition challenges nothing more than the lower court's interpretation of those provisions of the Beecher decree that address: (i) how, under the decree, it is determined that a fire department has met the decree's minority hiring goal, such that minority applicants are no longer granted preferential standing on the eligibility list, and (ii) whether minority preferences continue under the decree until the decree's hiring goal is met, if the Personnel Administrator has developed a firefighters examination that is valid under Equal Employment Opportunity Commission ("EEOC") guidelines. Petitioners also challenge the Court of

Appeals' conclusion that the evidence does not warrant the BFD's release from the decree.[6/]

Petitioners nowhere establish that the issues they raise are unsettled, recurring or of broad impact. The alleged "error" in the decision below has no importance of any kind beyond the particular facts of this case and the parties involved here. For these

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6/ In this regard, petitioners recite as "presumed to be true" facts that are directly contrary to those found by the District Court. Petition, p. 9. For example, petitioners claim that Boston had a black population of 18.7% when their suit was filed in 1989. Id. In fact, the District Court found that, in 1980, 22.4% of Boston's population was black and, in 1990, 29.72% of Boston's population over age 18 was black. App. 19a, 24a.

reasons, the petition should be denied. See General Pictures Co. v. General Electric Co., 304 U.S. 175, 178 (1938) ("Granting the writ would not be warranted merely to review the evidence or inferences drawn from it.").

In any event, petitioners' objections to the Court of Appeals' analysis are without merit. As the Court correctly held, the plain language of the decree, the past practice of the parties under the decree and common sense refute the petitioners' contention that the decree's hiring goal should be determined with reference to the minority population of Boston in 1974, when the decree was entered, rather than

with reference to current population figures. App. 8a-10a.[7]

Petitioners' contention that the hiring goals in the Beecher decree must be construed to refer to the minority percentage of what they call the "relevant labor pool" (i.e. persons age 19 and older),[8] and not the percentage of minorities in the community, is of no

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[7] The Court of Appeals also found this approach to be consistent with this Court's use of current population statistics in examining questions of compliance with school desegregation decrees. App. 9a-10a. See e.g., Freeman v. Pitts, 112 S.Ct. 1430, 1437-38 (1992).

[8] Massachusetts law requires a person to be 19 years of age to take the firefighters examination. Mass. Gen. Laws c. 31, § 58.

moment in this case. As the District Court and the Court of Appeals both held, even by this reference, the Department has not met the decree's hiring goals. App. 15a, 19a.

Petitioners also contend that the preferential certification requirements of the Beecher decree ended upon the administration of a validated firefighters examination. Petition, pp. 10, 11, 13. As the Court of Appeals held, the language of the decree does not support this view. The decree states that the preferential certification procedure "shall apply to all future eligibility lists established subsequent to a valid firefighter entrance examination." App. 10a, 34a. (emphasis added). Thus, the lower court

found that, under the decree, "validated examinations are not an end in themselves, but merely a means toward achieving the decree's actual objective: rough parity (to remedy the effects of past discrimination)." App. 10a.[9/]

[9/] For the same reason, the Court of Appeals correctly determined that the dispute among the parties as to whether the firefighters examination is valid is not material to whether preferential certification of minority applicants continues under the decree. App. 10a, n. 3. Nonetheless, petitioners ask this Court to accept their assertions on this disputed issue of fact. Petition, pp. 9, 14, 15. Certiorari review is not, however, appropriate for the determination of factual issues not passed on by the courts below. See United States v. Johnson, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts.").

II. THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT.

In City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989), a majority of the Court agreed that race-based preferences must be reviewed under a standard of strict scrutiny when challenged as violative of the Equal Protection Clause of the Fourteenth Amendment. Id. at 494 (plurality); id. at 519 (Kennedy, J., concurring in part and concurring in the judgment). To meet this standard, race-conscious judicial relief must be justified by "a compelling interest", id. at 505, and be "narrowly tailored" to further that interest. Id. at 507-508. See United States v. Paradise, 480 U.S. 149, 167 (1987) (plurality) (setting out two-part strict scrutiny test). Remedying

identified past discrimination constitutes a compelling state interest and is therefore a sufficient predicate for ameliorative race-based preferences. Croson, 488 U.S. at 500-505; Paradise, 480 U.S. at 167 (plurality); Wygant v. Jackson Board of Education, 476 U.S. 267, 274 (1986) (plurality).

The foregoing principles were carefully applied by the Court of Appeals in reviewing the Beecher decree. App. 6a-8a, 11a-13a.[10/]

10/ In addition, the Court of Appeals correctly noted that district courts should be flexible in considering requests for release from decrees entered in institutional reform litigation. App. 7a, citing Rufo v. Inmates of Suffolk County Jail, 112 S.Ct. 748, 760 (1992). The Court also

(Footnote continued on next page.)

Petitioners do not urge that a different standard was applicable. Rather, without raising one or more discrete issues for review, petitioners broadly contend that the lower court "improperly" applied the decisions of this Court cited above in rejecting their challenge to the Beecher decree. Petition, pp. 8-15. These general claims are both inappropriate for certiorari review and without merit.

(Footnote continued from previous page.)

noted that federalism concerns must inform its review of the Beecher decree, stating "that the 'legal justification for displacement of local authority . . . is a violation of the Constitution by the local authorities'". App. 7a, quoting Board of Education of Oklahoma City Public Schools v. Dowell, 111 S.Ct. 630, 636-637 (1991).

In Croson, this Court rejected the City of Richmond's use of a minority set-aside program in awarding construction contracts which was not justified by "identified" past discrimination in the local construction industry. 488 U.S. at 498-506. Similarly, in Wygant v. Jackson Board of Education, 476 U.S. 267, 274-276 (1986), a plurality of this Court found a general claim of "societal discrimination" to be an insufficient predicate for race-based teacher layoffs. In the present case, however, specific findings of discrimination were made, after evidentiary hearings, in the Beecher case which served as the factual predicate for the remedial decree. Petitioners do not challenge these

findings. See App. 7a ("In this case, appellants do not argue that the original finding of discrimination was flawed.") Consequently, petitioners cannot legitimately complain that the decision below departs from this Court's holdings in Croson and Wygant.

Petitioners also argue that the Beecher decree is not "narrowly tailored". See United States v. Paradise, 480 U.S. at 171. In doing so, however, they mischaracterize the decree as containing racial "quotas". Petition, p. 11. In fact, as the Court of Appeals found, "the decree does not require that minority aspirants be appointed." App 12a. Rather, it provides only that the eligiblity lists from which applicants are selected

(which must contain only the names of applicants who have passed the entrance examination and are otherwise qualified) shall have one minority applicant for each white applicant. App. 5a (note 2). Thus, the decree provides a mechanism which insures adequate representation of qualified minorities in the pool from which appointments are made; it does not mandate the selection of a particular number of minority candidates. App 12a, 31a-35a. The preferential certification procedure is also time-limited, and terminates when a fire department "achieves a complement of minorities commensurate with the

percentage of minorities within the community". App. 35a.[11/]

In view of the foregoing, the Court of Appeals correctly found that "the decree gives only a limited advantage, not a guarantee of employment, to minority applicants", and is "tailored with sufficient precision" to pass constitutional muster. App. 13a. Cf. Johnson v. Transportation Agency, 480 U.S. 616, 638 (1987) (approving affirmative action plan that did not mandate quota hiring, but "merely

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11/ Under this provision, a substantial majority of the fire departments that originally were subject to the Beecher decree have been released from its preferential certification requirements. R.A. 96.

authorize[d] that consideration be given to affirmative action concerns when evaluating qualified applicants").

Finally, petitioners assert that a non-discriminatory examination has been given and the BFD has made "tremendous strides" in remedying the effects of past discrimination. They argue, therefore, that there is no legitimate reason for the decree to have continuing effect. Petition, pp. 10-11, 13-15. It is true that the equitable power of the federal courts may be used only where necessary to remedy a violation of federal law or the constitution. Board of Education of Oklahoma City Public Schools v. Dowell, 111 S. Ct. 630, 637 (1991). However, petitioners' claim in this regard is again grounded in the particular facts of this case, rather

than any issue of general importance. The lower courts both found that the BFD has not achieved, even substantially, the decree's minority hiring objective, which is the benchmark by which to determine whether past discrimination has been remedied. See App. 10a, 12a, 15a, 23a-24a. Because the decree continues to serve a remedial purpose with respect to past discrimination, the petitioners' challenge was correctly rejected below. United States v. Paradise, 480 U.S. at 167.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

PERSONNEL ADMINISTRATOR OF THE
COMMONWEALTH OF MASSACHUSETTS

Respectfully submitted,

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